No. 98-

IN THE

Supreme Court of the United States

PASTOR MICHAEL CLOER AND PASTORS FOR LIFE, INC.
Petitioners,

v.

THE GYNECOLOGY CLINIC, INC.,
D/B/A PALMETTO STATE MEDICAL CENTER,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state court injunction restricts various expressive activities on public sidewalks. The Supreme Court of South Carolina affirmed the injunction, and the judgment upon which it was based, even though the conduct giving rise to the judgment against Petitioners was lawful and consisted of actions protected by the rights to freedom of speech, peaceable assembly, and religion.

The following questions are presented:

1. Does the First Amendment forbid the imposition of injunctive liability for the commission of admittedly *lawful*, *constitutionally protected* acts?

2. Does the imposition of an injunction without individualized findings of *unlawful* conduct violate due process?

3. Does imposition of state law civil liability for the exercise of federal constitutional rights violate the Supremacy Clause of the United States Constitution?

4. Does the injunctive creation of a "speech-free zone" on a public sidewalk near Respondent's abortion business, without any individualized findings of *unlawful* conduct, violate the Petitioners' rights to freedom of speech, peaceable assembly, and religion?

PARTIES

All of the petitioners are listed in the caption on the cover. Pastors for Life, Inc., is a not-for-profit corporation that has neither parent nor subsidiary corporations. *See* Rule 29.6.

No other persons or entities, other than the one listed in the caption on the cover, were respondents in the proceedings below or are respondents in this Court.

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INTRODUCTION

In an astounding decision, the Supreme Court of South Carolina has concluded that injunctive liability may be imposed and restraints on paradigmatic expression suffered as a consequence of engaging in *lawful*, *constitutionally protected* activities. The abbreviated reasoning to support the decision below is as follows:

> *Appellants first assert that, because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy*. Under South Carolina law, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another. The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable. *Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy*.

Pet. App. at 2a (internal quotation marks and citations omitted, emphases added).

The Petitioners, Pastor Michael Cloer and Pastors for Life, Inc., respectfully request that this Court grant the petition for a writ of certiorari in order to reverse the decision below.

DECISIONS BELOW

The decision of the Supreme Court of South Carolina is not yet published. Pet. App. 1a. The orders and opinions of the Court of Common Pleas of Greenville County are unreported. App. 4a-23a.

JURISDICTION

The South Carolina Supreme Court issued its opinion affirming the judgment of the Court of Common Pleas of

Greenville County on March 15, 1999. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional and statutory provisions involved in this case are set forth in the Appendix to the Petition: United States Constitution Art. VI, cl. 2 and amends. I and XIV § 1; S.C. Code Chapter 32.

STATEMENT OF THE CASE

A. Statement of Material Facts

Gynecology Clinic, Inc. ("Gynecology Clinic") is a medical business in Greenville, South Carolina. Palmetto State Medical Center is a transaction name of the Clinic. Among other things, Gynecology Clinic performs abortions.

Michael Cloer is the senior pastor of Siloam Baptist Church in Easley, South Carolina. Since 1989, he has engaged in expressive activities on the public sidewalks near Gynecology Clinic. These activities include prayer, reading scripture, explaining the right to life to others, describing the wrong of abortion, and offering alternatives to abortion. He has also shared various written materials, displayed posters, preached, and sung. Concerned citizens, including other people of faith, have joined Pastor Cloer in these activities.

Because he is opposed to legalized abortion, Pastor Cloer has led these activities, joined in them, and supported them. His opposition to all human abortion is based on his religious faith and the values derived from them. The expressive activities reflect his purpose and design of bringing to an end the present, legal status of abortion in this country *and* his intention to try,

through lawful means, to prevent abortions at Gynecology Clinic.

Pastor Cloer founded and directed Pastors for Life, Inc. ("Pastors for Life"). Pastors for Life has two corporate purposes: providing pro-life education and offering alternatives to abortion. Although not a membership organization, Pastors for Life welcomes the participation in its activities of any pastor who shares its doctrinal view on the sanctity of human life. Pastors interested in the work of the group meet monthly to pray and to discuss the promotion of pro-life activities in their respective congregations.

From the inception of their activities, Pastor Cloer and Pastors for Life have objected only to one thing: human abortion. Neither Pastor Cloer nor Pastors for Life have acted from a purpose of driving Gynecology Clinic out of business or forcing it to endure any financial injury. Pastor Cloer and Pastors for Life did not join with any other person in a plan or design to injure the Gynecology Clinic or its employees and agents. Pastor Cloer and Pastors for Life have no other interest in what occurs at Gynecology Clinic except that the business performs abortions that, according to Pastor Cloer's understanding, are abhorrent to and violative of God's law.

B. Statement on Preservation Below of Federal Questions

1. *The Federal Questions Were Raised and Preserved in the Trial Court.*

Gynecology Clinic filed suit in the Court of Common Pleas of Greenville County on or about August 9, 1994. Respondent alleged three causes of action based on private nuisance, public nuisance, and civil conspiracy, and requested damages, injunctive relief, and other relief.

On or about August 12, 1994, the Court of Common Pleas granted an *ex parte* temporary restraining order, *see* Order, Pet. App. at 4a. That Order prohibited Petitioners and others from: offering written literature or oral counsel to persons in vehicles crossing the public sidewalk onto the driveway serving Gynecology Clinic; assembling on the public sidewalk adjacent to Gynecology Clinic; standing or walking across Gynecology Clinic's driveway; using bullhorns or any other noise making device, including any excessive noise making, within a hundred and fifty feet of the property line. *Id.* In addition, the temporary restraining order created a twenty foot speech free zone from which Petitioners and others were ordered to remove themselves.[1]

On September 7, 1994, the court held an evidentiary hearing on Respondent's motion for a temporary injunction.[2] In advance of the hearing, Petitioners filed a memorandum in opposition to the requested injunction. In that memorandum, Petitioners had their first opportunity to raise the federal questions presented here and they did so. Petitioners argued that the requested injunction would suppress their constitutional rights, including the rights of free speech, peaceable assembly, and free exercise of religion. The trial court continued the modified temporary restraining order in place pending the receipt of post-hearing briefs addressing the evidence and the

1. On August 19, 1994, the trial court modified *sua sponte* the temporary restraining order. Pet. App. at 7a.

2. Under South Carolina civil practice, an injunction *pendente lite* is denominated a Temporary Injunction and is the state law equivalent of a preliminary injunction in federal practice.

legal issues.[3]

On or about October 11, 1994, Petitioners moved to dismiss the complaint. In their written argument, Petitioners argued that the activities complained of were pristine forms of constitutionally protected expression. Simultaneous with their motion to dismiss, Petitioners filed their post-hearing memorandum opposing the temporary injunction motion. In that memorandum, Petitioners again objected to the proposed temporary injunction on the ground that the relief requested would suppress the exercise of federal constitutional rights of speech, assembly and religion. Petitioners also objected to the injunction because the only evidence offered against them consisted of evidence that they had engaged in the exercise of their federal constitutional rights of speech, assembly and religion; consequently, Petitioners argued, Gynecology Clinic had not made a prima facie showing on the merits of its claims.[4]

Although the trial court had, on September 7, 1994, ordered the continuation in force of the temporary restraining order pending receipt of the filing by Petitioners of their post-hearing memorandum, no order dissolving the temporary restraining order ever issued. Consequently, on November 16, 1994, Petitioners filed a motion to vacate the temporary restraining order. In the motion, Petitioners again raised the federal

3. The Court of Common Pleas never ruled on the motion for a temporary injunction. Ultimately, the presiding judge recused himself from further consideration of the matter.

4. Under South Carolina civil practice, a temporary injunction will not issue unless the movant makes out a prima facie claim. *See Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313, 315 (S.C. 1969).

questions presented here, *viz.*, that the *ex parte* temporary restraining order violated federal constitutional rights of free speech, free exercise of religion and peaceable assembly. The Court of Common Pleas never ruled on the motion to vacate the temporary restraining order.

On April 4, 1996, the Court of Common Pleas heard and decided Petitioners' motion to dismiss. That court concluded that the public nuisance claim was not well-pled and dismissed it. The court denied the motion to dismiss as to the private nuisance and civil conspiracy claims. Thereafter, on April 24, 1996, Petitioners filed their Answer to the Complaint, together with their Affirmative Defenses and their Jury Demand. The federal questions presented here were again raised and preserved with this filing. Specifically, the Sixth, Seventh, Tenth, Twelfth, Thirteenth, and Fifteenth Affirmative Defenses asserted federal constitutional objections to the relief requested. These Affirmative Defenses also specifically objected to the entry of judgment against Petitioners on the basis of their exercise of federal constitutional rights.

Fifteen days later, Gynecology Clinic gave written notice to the trial court that it was waiving its claim for damages.

In October 1996, the case was heard on the merits as a nonjury matter. On May 14, 1997, the trial court decided the matter; the court granted judgment to Petitioners on the private nuisance claim; the court granted judgment to Gynecology Clinic on its civil conspiracy claim. On the basis of the judgment for Gynecology Clinic on the civil conspiracy claim, the trial court made permanent the modified temporary

restraining order. Pet. App. 17a.[5]

Petitioners sought post-trial relief under South Carolina's relevant rules of procedure. Petitioners' post-trial motion

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5. Under the permanent injunction, the Petitioners are enjoined:

1. At all times and on all days, from trespassing on the private property of Palmetto State Medical Center, including its driveway and parking lot.

2. At all times and on all days, from interfering with the unfettered ingress to and egress from the Palmetto State Medical Center building and its parking lot.

3. At all times and on all days, from interfering with the free flow of traffic on the property of the Palmetto State Medical Center and the public streets and sidewalks of Greenville County. A parked vehicle or a person not on private property of the Palmetto State Medical Center may be approached only so long as the contact is strictly peaceful and does not include the exchange of fighting words or threats. However, any vehicle containing a physician employed by Palmetto State Medical Center or the physician may not be approached.

4. At all times and on all days, from picketing, demonstrating, or in any way congregating on the public sidewalk twelve feet on either side of the driveway of the Palmetto State Medical Center. This area is to constitute a buffer zone. As a general rule this encompassed the space between the while lines painted on the sidewalk. One may walk across this area of the sidewalk only as necessary to reach an unrestricted location.

5. At all times and on all days, from obstructing the view of street traffic by any vehicle that is attempting to exit the Palmetto State Medical Center or to allow the safe egress of traffic onto Laurens, Road, a busy city street.

6. During the hours the clinic is in operation and accepts patients, from making any noise, including the use of any bullhorn or loudspeaker, that would be heard by a person of ordinary hearing inside the walls of the Palmetto State Medical Center.

Pet. App. at 11a-12a.

raised yet again the federal questions presented here. Particularly, Petitioners argued that liability was imposed on them for the exercise of federal constitutional rights and that the injunction violated principles of federal constitutional law. On July 22, 1997, the trial court denied the motions to alter and/or amend the judgment against Petitioners. The trial court found that Michael Cloer had prepared and mailed a letter to Pastors for Life in which he said:

> It would be difficult to overstate the importance of locating a CPC [presumably a 'crisis pregnancy center'] next door to the abortion mill. Not only will the CPC provide a much needed service to mothers and babies in the inner city, but in so doing it will undercut the 'business' of the abortion mill, and thereby play a key role in closing it down.

Pet. App. at 16a-17a. The trial court also found that Richard Cash, an employee of Pastors for Life, stood "at the end of the clinic driveway with a sign that read 'Don't turn in, Keep Going.'" *Id.* In addition, the trial court found that Pastor Cloer used "a bullhorn to coordinate the activities of the sidewalk counselors gathered in front of the clinic." Finally, the trial court found that Richard Cash had been identified by witnesses at the temporary injunction hearing as "having crowded the clinic driveway and having blocked the view" of oncoming traffic. *Id.*

Petitioners timely appealed to the Supreme Court of South Carolina.

2. *The Federal Questions Were Raised and Preserved in the South Carolina Supreme Court.*

On appeal, Petitioners again raised and preserved the federal questions presented here, both in their appellate briefs and in their oral argument. Specifically, they argued that the trial court judgment rested on proof that Petitioners had engaged in conduct protected from infringement by the United States Constitution; Petitioners also argued that the injunction issued by the trial court violated principles of federal constitutional law.

On March 15, 1999, in a brief *per curiam* opinion, the Supreme Court of South Carolina affirmed the civil conspiracy judgment and the terms of the injunction. *See* Pet. App. at 1a. The court stated:

> *Appellants first assert that, because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy.* Under South Carolina law, "lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another.'" *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988).

Pet. App. at 2a (emphasis added). Having decided that conduct protected from infringement under the United States Constitution could give rise to liability for civil conspiracy under South Carolina law, the court examined the record to determine whether the evidence therein support the trial court judgment. The court concluded:

> *The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable.*

> Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy. *LaMotte v. Punch Line of Columbia, Inc., supra.*

Pet. App. at 2a (emphasis added). The court did not address Petitioners' arguments that the terms of the injunction violated federal constitutional principles.

REASONS FOR GRANTING THE WRIT

Twice this Court has reviewed injunctions restraining expressive activities of persons opposed to abortion. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). Twice this Court has circumscribed the relief granted by the judgments it reviewed. *Schenck*, 519 U.S. at 377 (striking floating bubble zone); *Madsen*, 512 U.S. at 773-74 (striking consent to approach requirement); *id.* at 773 (striking images observable requirement); *id.* at 771 (striking provisions of injunction extending into unrelated private property); *id.* at 774-75 (striking 300-foot speech-free zone around residences of clinic staff).

In *Madsen* and *Schenck*, this Court addressed the issuance of injunctive restrictions on expression in circumstances of *proven, egregious, unlawful* conduct effectively preventing access to the complaining abortion businesses. *Schenck*, 519 U.S. at 362-65, 380-81, 384-85; *Madsen*, 512 U.S. at 769. Here, in stark contrast, *no unlawful conduct* was found by the trial court or the Supreme Court of South Carolina. The trial court starkly contrasted the conduct of the Petitioners with that described by this Court in *Schenck*: "There is a marked difference between the *Schenck* defendants' apparent penchant for violence and the conduct of the present Defendants, which

might be best characterized as zealous." Pet. App. at 16a-17a. The court below pointedly noted that Petitioners' liability did not require proof of *unlawful* conduct and was satisfied by proof of conduct guaranteed from infringement by the First Amendment. Pet. App. at 2a.

The decisions in *Schenck* and *Madsen* reflect the fact that "First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Supreme Court of South Carolina, however, has girdled the First Amendment freedoms of the Petitioners with a strait-jacket, leaving to the Petitioners no room to breathe and little space for the exercise of these important, delicate and precious freedoms. Moreover, the court below did so without findings of *unlawful conduct*; rather, the court below held specifically that Petitioners' liability could properly be premised upon their *lawful exercise of constitutionally protected rights*.

The decision below directly conflicts with the applicable decisions of this Court regarding the standard of review applicable to injunctions, the obligation of a reviewing court to scrutinize the record, the First Amendment and Due Process requirements that individualized findings of *unlawful* conduct alone are the appropriate justification of injunctive restrictions on constitutional rights, and the public forum and prior restraint doctrines.

Moreover, the decision below raises an important and substantial question of federal constitutional law. The decision of the court below allows the imposition of civil liability under *state* law to be premised upon evidence that Petitioners engaged in lawful expression protected by the *federal* Constitution. The imposition of liability in such circumstances directly affronts the Supremacy Clause of the United States Constitution.

Finally, subsequent to the decision below, on June 1, 1999, a new South Carolina statute took effect, the South Carolina Religious Freedom Act, S.C. Code §§ 1-32-10 *et seq*. That Act, on its terms, is applicable to this litigation. Neither the Supreme Court of South Carolina nor the trial court, however, had the opportunity to consider or decide how the defense to liability provided by the Act would affect the judgment here. For that reason, this case is an apt one in which to grant the petition, vacate the judgment below, and remand the case for further consideration in light of a change in law.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision below directly derogates this Court's precedents.

A. *Madsen v. Women's Health Center, Inc.*

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court concluded that content-neutral injunctive restrictions on expressive activity violate the right to free speech unless, at a minimum, the restrictions "burden no more speech than necessary to serve a significant government interest." *Id.* at 765.[6]

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6. This Court explained further, 512 U.S. at 767, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968):

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84. *See Madsen*, 512 U.S. at 767.

Petitioners' expressive activities covered a broad spectrum — from prayer to proclamation, from singing psalms to silence. Petitioners' pro-life speech "is entitled to the fullest possible measure of constitutional protection," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing, as example, "Abortion is Murder"). Hence, no exception to the prior restraint doctrine justifies the injunctive restrictions affirmed below.

The court below simply failed to comport its decision with *Madsen*'s teaching. Ignoring *Madsen*, the court below sustained a large-scale amputation of First Amendment jurisprudence. By contrast, the proper constitutional analysis to be applied to a request for injunctive relief entails a searching examination (omitted in the brief *per curiam* decision below).

For example, the court below upheld the injunction even though Petitioners' liability was premised solely upon their exercise of federal constitutional rights. *But see Madsen*, 512 U.S. at 765 n.3 (noting prerequisite that equitable principles be satisfied prior to grant of injunction). Nor is the injunction narrowly tailored to Respondent's claim of civil conspiracy. *But see Madsen*, 512 U.S. at 762 ("the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public"). Here, for example, the injunction prohibits picketing, demonstrating or congregating within a buffer zone even though such activities are unrelated to civil conspiracy, the only claim on which Respondent prevailed. The injunction utterly fails to address conduct related to the commission of a civil conspiracy, instead addressing itself to various restrictions on the constitutional rights and liberties of the Petitioners.

This Court, in *Madsen*, reiterated the point that injunctions of the sort issued below must be limited to those persons who threaten the irreparable harm in question. 512 U.S. at 765 n.3. The court below, however, affirmed the entry of the injunction even though the Petitioners had been shown only to have engaged in *lawful*, *constitutionally protected* conduct.

Further, in *Madsen* this Court crafted an exception to the prior restraint doctrine for injunctive restraints that restrict speech only *indirectly* and only *because of prior unlawful conduct*. 512 U.S. at 763 n.2. The court below affirmed the injunction even though it does not fall within the *Madsen* exception to the prior restraint doctrine. The injunction directly restricts speech by prohibiting "picketing[and] demonstrating" within the buffer zone and by regulating speech other than "strictly peaceful" contacts on the public streets and sidewalks of the county. Pet. App. at 11a.

The court below also disregarded *Madsen* when it upheld the injunction against the Petitioners, rather than limiting such relief to those parties who had engaged in unlawful conduct. Compare *Madsen*, 512 U.S. at 770. The trial court described the conduct at issue in this case as no more than "zealous." Pet. App. at 17a. The court below affirmed the judgment and the injunction even though, as to the Petitioners, it rested only on evidence of *lawful*, *constitutional protected* expression. Pet. App. at 2a.

The court below ignored the requirement identified in *Madsen*, 512 U.S. at 764-66, that injunctive relief serve a significant government interest. Here, the court below never inquired into the nature of such government interests. Evidence in the trial court established that there was no record of traffic

accidents or incidents at the site or in its vicinity. Had the court below, in compliance with *Madsen*, taken pains to examine the record, it would have found nothing to justify the assertion that traffic safety was a significant government interest at stake here.

The decision below directly conflict with *Madsen*.

B. *Schenck v. Pro-Choice Network of Western New York*

The court below upheld the entry of an injunction based on Petitioners' *lawful*, *constitutionally protected* acts and it did so without subjecting the injunction or its terms to the appropriate standard of scrutiny. Although it cited *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), the court below never applied the heightened scrutiny required by *Madsen* and *Schenck* to the injunction or its terms. *See* Pet. App. at 1a-3a. As a result, Petitioners are restrained from exercising federal constitutional rights under the state court injunction without that injunction being shown to be no more burdensome to those constitutional rights than necessary to serve a significant government interest.

Moreover, in *Schenck*, this Court found egregious unlawful conduct proven in the record. Here, the trial court contrasted the record in this case with that in *Schenck*: "There is a marked difference between the *Schenck* defendants' apparent penchant for violence and the conduct of the present Defendants, which might be best characterized as zealous." Pet. App. 17a. In *Schenck*, this Court found that "the buffer zones [were] necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." 519 U.S. at 380. The trial court, however, made no finding that buffer zones were necessary to ensure access, nor is there any

evidence in the record to support such a finding with regard to the conduct of Pastor Michael Cloer or Pastors for Life, Inc.

Unlike Pastor Michael Cloer and Pastors for Life, the *Schenck* protesters, "purposefully or effectively blocked or hindered people . . . from driving in and out of clinic parking lots." *Id.* The trial court did not find as fact any such conduct by Pastor Michael Cloer or Pastors for Life. Not only did the *Schenck* protesters engage in obstructive conduct of an unlawful character, their conduct frustrated the ability of law enforcement to act: "defendants' harassment of the local police made it far from certain that the police would be able to quickly and effectively counteract protesters who blocked doorways . . . ." *Id.* Here, however, Pastor Cloer or Pastors for Life did not engage in any such conduct. No evidence warranted the construction of such buffers by the trial court here. The decision below directly conflict with *Schenck*.

C. *NAACP v. Claiborne Hardware Co.*

The court below upheld a civil conspiracy judgment and an injunction based thereon without any findings that the Petitioners – Pastor Cloer and Pastors for Life – actually engaged in or threatened to engage in *any unlawful activity*. To the contrary, the Supreme Court of South Carolina concluded that a liability could be imposed, and an injunction could issue, based on evidence that the Petitioners had engaged in the lawful exercise of activities protected by the First Amendment. Pet. App. at 2a. That holding squarely conflicts with this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

The First Amendment rights to free speech, assembly, and religion demand that courts carefully distinguish between

lawful and unlawful conduct, and between those who obey the law and those who ignore it. This Court explicitly so held in *Claiborne Hardware Co.* There, this Court reviewed a Mississippi court's order allowing damages and imposing an injunction against civil rights activists. This Court reversed, explaining that while the activists' behavior included "elements of criminality," their conduct also exhibited "elements of majesty." *Id.* at 888. This Court emphasized the obligation of courts to discriminate among lawful and unlawful conduct before imposing injunctive relief or damages:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . Specifically, *the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.*

Id. at 916-17 (emphasis added, citation omitted). To impose liability, the judgment "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties [used or] agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *Id.* at 933-34.

This Court also concluded that the injunction against the boycott activities of the civil rights activists "must be dissolved" "[f]or the same reasons. . . ." *Id.* at 925 n.67. Further, this Court declared that, at a minimum, "the injunction

must be modified *to restrain only unlawful conduct* and the *persons responsible* for conduct of that character." *Id.* (emphasis added).

The court below completely ignored the instruction given by this Court in *Claiborne Hardware*. The court rejected Petitioners' argument that "because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy." Pet. App. at 2a. As construed by the Supreme Court of South Carolina, "[u]nder South Carolina law, lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another." Pet. App. at 2a (internal quotation marks omitted, citation omitted).

Because the court below refused to separate out *lawful* and *constitutionally protected* activities from *unlawful* or *unprotected* conduct, its review of the evidence led it to conclude that the judgment before it was supported. "The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable. Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy." Pet. App. at __a (citation omitted). That startling holding squarely conflicts with the care and precision demanded by the First Amendment and demonstrated in *Claiborne Hardware Co.*

D. *Thompson v. City of Louisville*

The court below upheld a judgment of liability against Pastor Cloer and Pastors for Life while acknowledging that the judgment rested on evidence of *lawful* conduct guaranteed from infringement by the *First Amendment*. Just as "it is a violation of due process to convict and punish a man without evidence of

his guilt," *Thompson v. Louisville*, 362 U.S. 199, 206 (1960), so it is a violation of petitioners' due process rights to hold them civilly liable and enjoin them from the exercise of constitutionally protected rights without evidence of *unlawful* conduct. *Accord Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 18 (1978) ("[a]n injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct") (internal quotation marks omitted, citation omitted).

E. *New York Times Co. v. Sullivan*

This Court has noted on many occasions that it is the duty of a reviewing court "in proper cases" to "review the evidence to make certain that [constitutional] principles have been constitutionally applied." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). Reviewing courts must "search the records . . . where a claim of unconstitutionality is effectively made," to ensure that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by *insubstantial* findings of fact screening reality." *Claiborne Hardware Co.*, 458 U.S. at 924 (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1943) (emphasis added)).

In *Milk Wagon Drivers*, this Court upheld an injunction that took within its scope both violent and nonviolent activity. "[I]n that case," "violent conduct . . . was pervasive." In *Claiborne Hardware Co.*, however, this Court ordered the modification of an injunction because the lower court erred in relying on "isolated acts of violence" over the course of several years. This Court concluded that the lower court's ruling "'screens reality' and cannot stand." *Id.* at 924.

This case is not simply about a bare determination of civil liability. An injunction bars the Petitioners from engaging in constitutionally protected lawful conduct on a public sidewalk. Yet the Supreme Court of South Carolina refused to scour the record for evidence of *unlawful* conduct by the Petitioners. The court was satisfied that, under South Carolina law, evidence of Petitioners' *lawful, constitutionally protected* conduct satisfied the Respondent's obligation to prove its case. Pet. App. at 2a.

Both the trial court and the court below "screened reality." Initially, the trial court posited the liability of Petitioners on its conclusion that "the Defendants have both conspired and interfered with the lawful operation" of Gynecology Clinic. Pet. App. at 14a. The court's findings did not identify the particular *unlawful* conduct of the Petitioners supposedly causing any of the Respondent's injuries. Nonetheless, the court entered a judgment against Petitioners; consequently, the Petitioners moved to alter or amend the judgment. In response to that motion, the trial court explained: "the Defendant's [Petitioners'] motion is well-taken in that the May 12, 1997 order perhaps lumps all of the Defendants together too readily." Pet. App. at 19a. That said, the trial court proceeded to identify the specific conduct of Pastor Cloer and Pastors for Life upon which it entered the civil conspiracy judgment.

The trial court found that Pastor Cloer mailed an epistle to Pastors for Life in which he urged the establishment of a crisis pregnancy center next door to Gynecology Clinic's abortion facility. In the letter, Pastor Cloer explained that the crisis center would serve inner city mothers and their babies and would help to "undercut the 'business' of the abortion mill" next door. Pet. App. at 20a. The trial court also found that Pastor Cloer had used a bullhorn "to coordinate the activities of

the sidewalk counselors gathered" on the sidewalk adjacent to Gynecology Clinic. *Id.*

The basis of Pastors for Life's liability was the conduct of an employee, Richard Cash. Cash, the court found, had stood on the public sidewalk near Gynecology Clinic's driveway holding a picket sign that stated, "Don't Turn In, Keep Going." *Id.* Also, Cash had been identified by witnesses as having stood on the public sidewalk near the driveway in a manner the court found "crowded the clinic driveway" and "blocked the view" of oncoming traffic. *Id.* These facts alone are the basis for the determination of liability for civil conspiracy and for the injunction issued by the court against these Petitioners.

Rather than "examin[ing] critically the basis on which liability was imposed," *Claiborne Hardware Co.*, 458 U.S. at 915, the court below assumed for purposes of decision that these facts alone were the basis for the judgment against the Petitioners *and* that the facts identified by the trial court were instances of constitutionally protected expression. Pet. App. at 2a. The court below could assume these points because, under South Carolina law, liability for a civil conspiracy does not require evidence of unlawful conduct. The court simply failed to address the failure of the trial court to differentiate between the lawful, *constitutionally protected* conduct of the Petitioners and the unlawful or unprotected conduct of others.

Startlingly cavalier, the attitude of the court below toward the evidence and to the requirement of individualized proof of wrong-doing is the antithesis of the critical examination and close scrutiny mandated by this Court where First Amendment freedoms are in jeopardy.

F. The Public Forum Cases

The injunction prohibits Petitioners from demonstrating, picketing or congregating in a buffer zone also created by the injunction. *See* Pet. App. at 11a. That restriction plainly curtails the exercise of the right to free speech, peaceable assembly, and religion. Because the court below failed to subject the injunction to the standards called for by this Court's public forum decisions, it is in conflict with those cases.

This Court has held that sidewalks such as the one at issue here are quintessential traditional public fora. *United States v. Grace*, 461 U.S. 171, 177 (1983). Certainly, the demonstrations and picketing restrained by the injunction are classic forms of free speech. *Boos v. Barry*, 485 U.S. 312 (1988); *Grace*, 461 U.S. at 176-77; *Carlson v. California*, 310 U.S. 106, 112-13 (1940). Consequently, under this Court's public forum cases, the complete prohibition of those two categories of expression, demonstrations and picketing, should have been subjected by the court below to strict scrutiny. *Id.* ("[a]dditional restrictions *such as an absolute prohibition on a particular type of expression* will be upheld only if narrowly drawn to accomplish a compelling governmental interest") (emphasis added). By failing to subject the injunction to even the slightest scrutiny, the court below put itself directly in conflict with this Court's public forum cases.

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE TEXAS SUPREME COURT.

The Supreme Court of South Carolina affirmed the entry of a permanent injunction restraining Petitioners in the exercise of *lawful, constitutionally protected* expression. Pet. App. at 2a. In doing so, the decision below directly conflicts with a decision of the Supreme Court of Texas.

In *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993), the Supreme Court of Texas reversed the judgment of two lower courts enjoining anti-abortion activists from picketing near the home of an abortion provider.[7] In that case, the complaining physician brought suit after his neighborhood became the situs of several anti-abortion picketing events. 853 S.W.2d at 513. At trial, Aquino prevailed only on a count of negligent infliction of emotional distress and failed to obtain a favorable verdict on an invasion of privacy claim. *Id.* The trial court rendered judgment on the jury verdict and entered a permanent injunction against the neighborhood picketing activities of the anti-abortion activists. *Id.* On appeal, the court of appeals overturned a damages award and affirmed the injunction. *Id.*

Texas law does not recognize a cause of action for negligent infliction of emotional distress. *Id.* Consequently, the Texas Supreme Court concluded that the jury verdict and judgment had to be reversed. *Id.* In rendering its judgment, the Texas Supreme Court specifically rejected the argument, made in dissent by Justice Spector, 853 S.W.2d at 522-23, that the permanent injunction could be sustained "without a finding of legal liability . . . ." 853 S.W.2d at 514 n.2. In setting out the basis for its refusal to sustain the injunction, the Texas Supreme Court held, "[n]o final relief, including a permanent injunction, can be granted in a contested case without a determination of legal liability, and the dissenting opinion cites no authority to the contrary." *Id.*

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7. Justice Gonzalez, dissenting, framed the issue in *Valenzuela* as, "whether an otherwise lawful picketing operation may be directed toward a private home." 853 S.W.2d at 514. Ultimately, Justice Gonzalez concludes that it may not, even though the conduct is completely lawful. *Id.* at 516, 519.

Here, the only basis for the determination of the Petitioners' "legal liability" was their *lawful* exercise of *constitutionally protected* rights. Consequently, there exists no valid basis consistent with the First Amendment for the imposition of liability.[8] Concluding to the contrary, and affirming the entry of injunctive relief, the Supreme Court of South Carolina put itself squarely in conflict with the Texas Supreme Court.

This Court should grant the petition in order to resolve the conflict between state courts of last resort on an important question of federal constitutional law.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

The Supremacy Clause provides:

> *This Constitution*, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Art. VI, cl. 2 (emphasis added). In direct disobedience to this explicit provision, the Supreme Court of South Carolina has allowed the imposition of civil liability and an injunction for *lawful* conduct protected under "*this*

---

8. The Supreme Court of New Jersey also has permitted the imposition of permanent injunctive restraints on anti-abortion picketing activities in the absence of unlawful conduct and in the absence of success on a meritorious claim. *See Murray v. Lawson*, 138 N.J. 206, 649 A.2d 1253 (N.J. 1994).

Constitution."

The Supreme Court of South Carolina affirmed a *state law* civil conspiracy judgment against the Petitioners and the entry of an injunction restricting their *federal constitutional rights*. The court below took these steps while noting that the conduct for which the Petitioners were held liable consisted of *lawful*, *constitutionally protected* acts. Pet. App. at 2a. Even if the State of South Carolina were at liberty to create a cause of action that depends entirely on the commission of *lawful* acts, the Constitution of the United States requires that such a cause of action not cause injury to federal constitutional rights.

The court below failed to subject the *state* claim of civil conspiracy to the *federal* constitution. As direct and inevitable consequence, the judgment below frustrates the operation of the United States Constitution. Such frustration of the operation and purpose of the United States Constitution presents an important and substantial question of federal constitutional law that this Court should address and resolve.

In *Perez v. Campbell*, 402 U.S. 637 (1971), for example, this Court held unconstitutional an Arizona statute suspending the operators' licenses and vehicle registrations for nonpayment of automotive accident liability judgments. The Arizona statute had the effect (but not the purpose) of frustrating federal bankruptcy laws by depriving persons undergoing federal bankruptcy proceedings of their licenses and registrations. 402 U.S. at 644-48. In previous cases interpreting the Supremacy Clause, this Court had allowed "state law [to] frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration." 402 U.S. at 651-52.

In *Perez*, however, relying on the Supremacy Clause of the United States Constitution, U.S. CONST. Art. VI, this Court directly and specifically *overruled* those earlier precedents:

> We can no longer adhere to the aberrational doctrine of *Kesler*[*v. Dep't of Public Safety*, 369 U.S. 153 (1962)] and *Reitz*[*v. Mealey*, 314 U.S. 33 (1941)] that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. . . . [W]e conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.

402 U.S. at 651-52.

Here, the "full effectiveness of" the First Amendment rights to free speech, peaceable assembly, and religion are frustrated by the imposition of liability and injunctive restraints based only on the exercise of those rights. The decision below is offensive to the essential principle of the Supremacy Clause of the Constitution. This Court should grant the Petition in order to restore the appropriate relationship between the *federal* Constitution and *state* law.

IV. THE PETITION SHOULD BE GRANTED, THE JUDGMENT BELOW VACATED, AND THE CASE REMANDED FOR FURTHER CONSIDERATION IN LIGHT OF INTERVENING CHANGE IN STATE LAW.

On June 1, 1999, Governor Jim Hodges signed into law an Act of the South Carolina legislature that created a new substantive chapter of the South Carolina Code. That new chapter is entitled, "The South Carolina Religious Freedom Act" ("South Carolina RFA"). *See* Pet. App. at 25a-27a. Pursuant to the South Carolina RFA,

> The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:
>
> (1) in furtherance of a compelling state interest; and
>
> (2)the least restrictive means of furthering that compelling state interest.

Id.

By its terms, the South Carolina RFA is applicable to the litigation filed by Respondent Gynecology Clinic. *See* South Carolina Code §§ 1-32-50 and 1-32-60A, Pet. App. at 26a. The South Carolina RFA was enacted after the decision below by the Supreme Court of South Carolina. Consequently, neither the court below nor the trial court were afforded the opportunity to consider application of the statutory defense it provides to the imposition of civil liability; nor did the Supreme Court of South Carolina or the trial court have the opportunity to consider what limits upon injunctive relief might be required by the imposition of the "compelling government interests/least

restrictive means" test.

The occurrence of intervening events and circumstances warrants the granting of a petition in order to vacate the judgment below and remand the matter for further consideration in light of the changed circumstance or law.[9] One such changed circumstance is the intervening enactment of relevant legislation. *See, e.g., Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981) (Mem.); *Heckler v. Kuehner*, 469 U.S. 977 (1984) (Mem.).

The enactment of the South Carolina RFA serves as a particularly apt basis for the Court to grant the petition, vacating the judgment below and remanding. Under the new statute, the South Carolina courts are required to employ the "compelling government interests/least restrictive means" test. Employment of that mode of analysis will require the court below to apply a more stringent standard of review to the judgment of the trial court and to the terms of the injunction. Pet. App. at 25a-26a.

Granting the petition here, vacating the judgment below, and remanding for further consideration in light of the recent enactment of the South Carolina RFRA may also serve to prevent the unnecessary decision of the federal constitutional questions presented by the decision below. At a minimum, the South Carolina RFA is fairly subject to an interpretation that would render unnecessary the federal constitutional questions presented by this petition. *Cf. Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965).

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9. STERN, GRESSMAN, SHAPIRO, AND GELLER, SUPREME COURT PRACTICE 249-50 (7th ed. 1993).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

In the alternative, this Court should grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of the newly enacted South Carolina Religious Freedom Act, S.C. Code §§ 1-32-10 *et seq.*

Respectfully submitted,

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Dated: June 14, 1999.

Attorneys for Petitioners

APPENDIX

[Appendix A]

THE STATE OF SOUTH CAROLINA
In the Supreme Court

The Gynecology Clinic, Inc.,
d/b/a Palmetto State Medical Center, Respondent,

v.

Pastor Michael Cloer
and Pastors for Life, Inc., Appellant.

Appeal From Greenville County
Costa M. Pleicones, Circuit Court Judge

Opinion No. 24920.
Heard Feb. 2, 1999 - Decided March 15, 1999

AFFIRMED

Terry Haskins, of Greenville; and James Matthew Henderson, Sr., of The American Center for Law and Justice, of Washington, DC, for appellants.

Suzanne E. Coe, of Law Office of Suzanne E. Coe, of Greenville, for respondent.

PER CURIAM: This is an appeal from an order finding appellants engaged in a civil conspiracy, and enjoining their picketing activities directed towards respondent, an abortion services provider. We affirm.

Appellants first assert that, because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy. Under South Carolina law, "lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another.'" *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988). The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable. Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy. *LaMotte v. Punch Line of Columbia, Inc., supra.*

Appellants next contend that respondent did not prove a conspiracy because respondent did not show special damages. An action for civil conspiracy is an action at law, and the trial judge's findings will be upheld on appeal unless they are without evidentiary support. *Future Group II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996). In a conspiracy action, what is required is proof of the fact of damages, not certainty of amount. *Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942). "The elements which go to make up such damages must depend on the nature of the act and the injury." *Id.* Appellants' own literature, which claims to have damaged respondent by causing a dramatic drop in the number of abortions performed at the clinic, is itself evidence of damages. We affirm the trial judge's damages findings. *Future Group II v. Nationsbank, supra.*

Finally, appellants raise numerous evidentiary challenges to the findings of the trial judge which form the basis for the injunctive relief granted respondent. We find no evidentiary or constitutional error in the injunction issued here. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117

S.Ct. 855, 137 L.Ed. 1 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Accordingly, the order appealed from is

AFFIRMED.

[Appendix B]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff,	)	Case Number: 94-CP-23-2286
-vs-	)	ORDER GRANTING TEMPORARY RESTRAINING ORDER
Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	

This matter came before me on motion of Plaintiff for Temporary Restraining Order pending a hearing on August 18, 1994 for a Temporary Injunction. The verified complaint filed by the Plaintiff states that Plaintiff is a medical provider which provides abortion services on Laurens Road. Plaintiff alleges that the Defendants named have either participated in, encourage, aided or otherwise assisted repeated demonstrations at Plaintiff's establishment. The Plaintiff has further alleged that the Defendants have used methods including using bullhorns to disturb the activities inside the clinic, approaching and stopping traffic either seeking egress or ingress into the clinic, attempting to either counsel persons in the car or hand

them literature, lining the sidewalks around the clinic in such a manner that clearly prevents safe egress from the premises in that the cars cannot see oncoming traffic on Laurens Road, and continually standing in the driveway of the clinic, creating a danger and nuisance for all clients seeking access.

Plaintiffs have alleged in their request for a temporary injunction/restraining order that irreparable harm will occur should the Defendants be allowed to continue such conduct and have delineated specific harm damaged claimed in their complaint.

Based upon the above verified complaint and supporting affidavit(s), I hereby order the above defendants are temporarily restrained from:

1. Approaching and stopping traffic either seeking egress or ingress to Palmetto State Medical Center;

2. Attempting to either "counsel" persons in any car or hand any person in a car literature;

3. Lining the sidewalks around Palmetto State Medical Center in such a manner which clearly prevents safe egress from the premise and preventing view of oncoming traffic;

4. Standing or walking across the driveway of the above clinic;

5. Using bullhorns or any other noise making device, including any excessive noise making, within a hundred and fifty feet of the property line;

6. Additionally, in consideration of the allegations contained in the verified complaint, the supporting affidavit for this motion only, and the fear of the circumstances surrounding

Plaintiff's clinic, I hereby order a buffer zone of twenty feet upon which all Defendants are ordered to remove themselves. This buffer zone of twenty feet shall run from all actual parts of the clinic building or clinic entrance fence, which is directly attached to the building. Additionally, this buffer zone shall run twenty feet on either side of the clinic driveway. The Court recognizes the difficulties involved in that the adjoining property is allegedly owned by several Defendants. Apparently, the premises share a common driveway, which has caused difficulty in the past. Based upon the complaint and the allegations alleged, I hereby order the Defendants to cease and desist from coming or standing within twenty feet of the Plaintiffs side of the driveway, accepting the normal egress and ingress of automobiles pulling into the premise of Piedmont Women's Center.

Any violations of the above may be considered contempt of court and punished accordingly.

IT IS SO ORDERED

[signature omitted]

Presiding Court Judge
Thirteenth Judicial Circuit

Greenville, SC
August 12, 1994

[Clerk's certification stamp omitted]

[Appendix C]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff,	)	Case Number: 94-CP-23-2286
-vs-	)	ORDER
Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	

This Order is a modification of a Temporary Restraining Order issued by this Court on August 12, 1994, and shall be in effect until the hearing before this Court for a Permanent Injunction. It is based on the allegations of the Plaintiff contained in affidavits and other supporting documents presented to this Court when the August 12th Temporary Restraining Order was issued.

Through this order, this Court intends to protect a woman's freedom to seek medical or counseling services in connection with her pregnancy. Additionally, this Court intends to protect the First Amendment free speech rights and property rights of *all* citizens. As with the previous Order, the provisions of this

Order are intended to burden no more speech than necessary to serve significant government interests. The Plaintiff shall post a $500.00 bond.

IT IS ORDERED, that the above individually-named defendants and any person acting in concert with them are restrained from the following:

1. As all times and on all days, from trespassing on the private property of the Palmetto State Medical Center, including its driveway and parking lot.

2. At all times on all days, from interfering with the unfettered ingress to and egress from the Palmetto State Medical Center building and its parking lot.

3. At all times and on all days, from interfering with the free flow of traffic on the property of the Palmetto State Medical Center and on the Public streets and sidewalks of Greenville County. A parked vehicle or a person not on the private property of the Palmetto State Medical Center may be approached only as long as the contact is strictly peaceful and does not include the exchange of fighting words or threats. However, any vehicle containing a physician employed by the Palmetto State Medical Center or the physician may not be approached.

4. At all times on all days, from picketing, demonstrating, or in any way congregating on the public sidewalk twelve feet on either side of the driveway of the Palmetto State Medical Center. This area shall constitute a buffer zone. As a general rule, this area encompasses the space between the white lines painted on the sidewalk. One may walk across this area of the sidewalk only as necessary to reach an unrestricted location.

5. At all times on all days, from obstructing the view of street traffic by any vehicle that is attempting to exit the Palmetto State Medical Center, in order to allow the safe egress of traffic onto Laurens Road, a busy city street.

6. During the hours that the clinic is in operation and accepts patients, from making any noise, including the use of any bullhorn or loudspeaker, that would be heard by a person or ordinary hearing inside the walls of the Palmetto State Medical Center.

Any violation of this Order may be considered contempt of court and may be punished accordingly, including by fine or imprisonment or both.

IT IS SO ORDERED.

August 19, 1994 /s/

Larry R. Patterson
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

[Clerk's Certification Stamp Omitted]

[Appendix D]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff,	)	Case Number: 94-CP-23-2286
-vs-	)	ORDER
Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	

This matter came before me for trial on October 15, 1996. Plaintiff alleged that the Defendants' conduct constituted a private nuisance and/or a civil conspiracy and sought a permanent injunction. On August 19, 1994, The Honorable Larry R. Patterson entered an order[1] enjoining the Defendants from engaging in certain activities. That Order provided, with

1. The August 19, 1994 order continued in effect the provisions of a temporary restraining order issued on August 12, 1994. A preliminary hearing on the merits was held on September 7, 1994. After that hearing, the only modification of the August 19, 1994 order was an oral one, which excluded the Piedmont Women's Center from its operation.

regard to Defendants, that they were enjoined:

1. At all times and on all days, from trespassing on the private property of Palmetto State Medical Center, including its driveway and parking lot.

2. At all times and on all days, from interfering with the unfettered ingress to and egress from the Palmetto State Medical Center building and its parking lot.

3. At all times and on all days, from interfering with the free flow of traffic on the property of the Palmetto State Medical Center and the public streets and sidewalks of Greenville County. A parked vehicle or a person not on private property of the Palmetto State Medical Center may be approached only so long as the contact is strictly peaceful and does not include the exchange of fighting words or threats. However, any vehicle containing a physician employed by Palmetto State Medical Center or the physician may not be approached.

4. At all times and on all days, from picketing, demonstrating, or in any way congregating on the public sidewalk twelve feet on either side of the driveway of the Palmetto State Medical Center. This area is to constitute a buffer zone. As a general rule this encompassed the space between the while lines painted on the sidewalk. One may walk across this area of the sidewalk only as necessary to reach an unrestricted location.

5. At all times and on all days, from obstructing the view of street traffic by any vehicle that is attempting to exit the Palmetto State Medical Center or to allow the safe egress of traffic onto Laurens, Road, a busy city street.

6. During the hours the clinic is in operation and accepts patients, from making any noise, including the use of any bullhorn or loudspeaker, that would be heard by a person of ordinary hearing inside the walls of the Palmetto State Medical Center.

This case is emotionally highly-charged and the parties have from time to time strayed off course and sought to frame it as one involving the right to have an abortion. This Court is neither asked in pleadings, nor does it purport in this Order to sort out the legal and moral issues surrounding abortion. Notwithstanding the Defendants' well-take points of view concerning the sanctity of human life, abortion is constitutionally protected and is not the issue here.

The real issue is whether, and to what extent, Defendant's conduct may be restrained in order to protect the lawful operation of Plaintiff's business, while at the same time insuring that Defendants' First Amendment rights are not unduly infringed.

Toward that end, I have determined that the parties, while attempting at trial to justify and promote their respective moral and/or legal stances with regard to abortion, have each -- perhaps unintentionally -- demonstrated that the temporary injunction has, for nearly three years, fairly delineated the battlefield upon which they wage their conflict. The generally peaceful period during which the temporary injunction has been in effect bears testament to its efficacy.

Notwithstanding that observation, I must first decide whether Plaintiff has borne its burden of proof as to either of its causes of action even before reaching the issue of entitlement to injunctive relief. Having reviewed the extensive record and the

numerous exhibits submitted on behalf of all parties, I have concluded that as to its cause of action for private nuisance, Plaintiff has not borne that burden.

Under the law of South Carolina, such a cause of action may only be properly directed toward a defendant who owns land adjoining, or in close proximity to the property of a plaintiff. *See Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 52, 130 S.E.2d 363 (1963); *Doremus v. Atlantic Coast Line R.R.*, 242 S.C. 123, 130 S.E.2d 370 (1963); *Bowlin v. George*, 239 S.C. 429 123 S.E.2d 528 (1962); *Deason v. Souther Ry.*, 142 S.C. 328, 140 S.E. 575 (1972); F.P. Hubbard & R.L. Felix, THE SOUTH CAROLINA LAW OF TORTS 165 (1990); 58 Am Jur 2d *Nuisances* § 1 (1971). Thus, in this case the individual Defendants could not, under any set of circumstances, be found liable for a private nuisance because they are not the owners of any land allegedly used for some wrongful act that proximately cause the Plaintiff some injury.

The remaining Defendants avoid liability on the nuisance theory because the record is devoid of any evidence that their *land* was used for some wrongful purpose. Plaintiff has posited the theory that merely providing a gathering place for those who violate the law by unlawfully venturing onto the adjacent property sustains an action for private nuisance. I disagree. The law of South Carolina does not provide redress to Plaintiff for the Defendants' activities in this case under this particular rationale. While Plaintiff has suffered an unreasonable interference with the use and enjoyment of its land, such interference was occasioned by the conduct of the Defendants separate and apart from any nexus they may have had with the land owned by Pastors for Life.

On the other hand, as to Plaintiff's cause of action of civil conspiracy, there is no question but that the Defendants have conspired with the intent to injure the Plaintiff and that they have caused special damage to the Plaintiff in the form of a decrease in Clientele. *Lee v. Chesterfield Gen'l Hosp.* 289 S.C. 6, 344 S.E. 2d 379 (Ct. App. 1986). It is abundantly clear to this court that the Defendants have both conspired and interfered with the lawful operation of Plaintiff's business by blocking access thereto. Pastor Michael Cloer admitted as much in both his affidavit and in this testimony before me. Video tapes of activities conducted at the clinic at varying points in time reveal a pattern of behavior by the other individual defendants acting in concert with members of Pastors for Life by utilizing the property it controls as a staging point for their protests. The only Defendant that escapes culpability on the record before me is the Piedmont Women's Center. As Judge Patterson noted at the September 7, 1994 hearing, there is scant evidence to suggest that this entity promotes or participates in the activities which are the subject of this litigation.

While the other Defendants would certainly deny that their conduct amounts to a "conspiracy" in a formal sense, the circumstantial evidence of coordinated and cooperative efforts toward the shared goal of stopping the practice of abortion at the clinic admits of but one conclusion. The Defendants' expression of bonhommie toward the clinic in its provision of non-abortion-related services fly in the face of their universal desire to see and end to the provision of abortion services at the Laurens Road location.

Moreover, testimony from several witnesses at both the October, 1996 hearing and the September 7, 1994 hearing

before Judge Patterson indicates that the Gynecology Clinic has suffered damages in the form of decreased clientele or interrupted business. On several occasions, Plaintiff has had to resort to law enforcement to maintain access to its property. Witnesses testified that in certain instances they had seen cars diverted from Plaintiff's driveway. Otherwise noted that patronage of Plaintiff's business has declined over time as a result of the Defendants' activities.

I find that this damage flows from the Defendants' *means* of conveying their message. as opposed to its subject matter. Doubtless, few of the women who find themselves in the circumstance of paying a visit to the clinic are receptive to the Defendants' entreaties at least initially. The law is nonetheless clear that there is no right to freedom from unwanted or repugnant speech. Be that as it may, the testimony from patrons, volunteers, and employees of the clinic paints a clear picture of repeated episodes of intimidation, harassment, crowding or blocking of access to clinic property on the part of the Defendants,

Having so found, the only remaining questions before this court concern the appropriate remedy. Plaintiff had initially sought money damages in addition to injunctive relief, but it abandoned its prayer for damages at trial, requesting only a permanent injunction at least as restrictive as the temporary injunction issued by Judge Patterson. Because the Defendants' constitutional right to free speech is implicated by these facts, I must ascertain whether such an injunction is an unreasonable restriction thereon.

While the Defendants may assert that they should be able to exercise their First Amendment rights unfettered, our

constitutional law has long recognized that reasonable time, place, and manner restrictions on speed do not result in an unconstitutional deprivation of freedom. The test is whether restrictions on speech are: (1) content neutral; (ii) narrowly tailored to serve a significant government interest, and (iii) leave open ample alternative channels for communication of the information. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Where an injunction is the vehicle for the speech restriction, the test becomes "whether the challenged provision of the injunction burden no more speech than necessary to serve a significant governmental interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994). The *Madsen* test applies here.

In the interim between the hearing on this matter and the entry of this order, the United States Supreme Court rendered its latest opinion with respect to the subject matter of the case. In *Schenck v. Pro Choice Network of Western New York*, Op. No. 95-1065 (February 19, 1997), the Court found an order which created a "fixed buffer zone" much like the one created here was constitutional. *Schenck* is particularly instructive because the injunction under review in the case was significantly more restrictive than the one in place here. I find that identical governmental interest exist in both *Schenck* and in this case, to wit: ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the freedom to lawfully obtain abortion services. The fact that Judge Patterson's order effects fewer constraints on Defendants' First Amendment freedom than did the *Schenck* injunction indicates to me that it is well-tailored to the outer limits of Defendants' conduct. There is a marked difference between the *Schenck* Defendants' apparent

penchant for violence and the conduct of the present Defendants, which might be best characterized as zealous.

In short, I find no reason why the present temporary injunction should not be made permanent. As written, Judge Patterson's Order reasonable delineates the parties' rights and obligations without unnecessarily restricting Defendants' right to free speech. The injunction merely assures safe access to the clinic and a tranquil environment inside it. Notwithstanding the Plaintiffs' demand for a more restrictive injunction as well as the Defendants' disingenuous contention that the present Order is unclear and leaves them confused as to how to comely with its proscriptions, I decline to alter it substantively. The wording of the temporary injunction is not mysterious or vague. Rather, it sets forth minimal restraints upon the Defendants so as to accomplish an uncomplicated and legally correct result that is fair to all the parties.

It is therefore ORDERED that the temporary injunction issued on August 19, 1994, as orally modified on September 7, 1994, be made permanent.

SO ORDERED.

/s/
Costa M. Pleicones
Presiding Judge

May 12, 1997
Columbia, SC

[Clerk's Certification Stamp Omitted]

[Appendix E]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff, -vs- Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	Case Number: 94-CP-23-2286 ORDER

On May 29, 1997, counsel for Defendants Cloer and Pastors for Life, Inc. filed a motion under Rules 52(b) and 59 of the South Carolina Rules of Civil Procedures seeking to have me alter and/or amend the order I issued on May 12, 1997. After reviewing the motion and Plaintiff's return thereto, I find that oral argument would not be of assistance to the court.

Counsel for these Defendants raises three grounds for alteration and/or amendment of the May 12 order, none of which has merit. The first ground alleges that I failed to rule explicitly upon the Defendants' second, seventh, and ninth affirmative defenses. The second defense, in which the Defendants asserted that Plaintiffs' claims were barred by the

statute of limitations, was not raised or argued at trial and was deemed to have been abandoned. Even had I addressed this defense specifically, the actions of Pastor Cloer and Pastors for Life which created the predicate for my order occurred well-within the applicable limitations period. S.C. Code Ann. § 15-3-535 (Supp. 1996)

The seventh and ninth defenses assert that the Defendants actions art protected by the United States and South Carolina constitutions, respectively. My order implicitly rejected both defenses under the *Madsen v. Women's Health Center*, Inc.[2] and *Schenck* v. Pro Choice Network of Western New York[3] rationale, as will be further explained herein.

As their second ground, Defendants allege that the May 12, 1997 order does not comply with the requirements of Rule 52(a) of the SCRCivP. Specifically, they assert that the order fails to set forth findings of fact and conclusions of law with the requisite particularity. As an initial matter, I would commend the Defendants' attention to the case of *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991), which states that the requirement of Rule 52(a) is merely directory. Nonetheless, the Defendant's motion is well-taken in that the May 12, 1997 order perhaps lumps all of the Defendants together too readily.

That said, I will briefly revisit the acts of Pastors for Life, Inc. and Pastor Michael Cloer as they relate to Plaintiff's cause of action for civil conspiracy. To be liable under this theory, there must be (1) a combination of two or more person, (2) for the purpose of injuring the plaintiffs, (3) which causes him special

2. 512 U.S. 753 (1994)

3. Op. No. 95-1065 (February 19, 1997).

damage. *Charles v. Texas Co.*, 192 S. C. 82, 5 S.E.2d 464 (1939). As further explained in *Lee v. Chesterfield Hospital*, 289 S.C. 6, 10-11, 344 S.E.2d 379, 381-82 (Ct. App. 1986),

> The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. A civil conspiracy may, of course, be furthered by an unlawful act. However, conspiracy may lie even thought no unlawful means are used and no independently an unlawful act is not a necessary element of the tort. An action for unlawful acts are committed. (Citations omitted).

In many instances, proof of the conspiracy must be accomplished by circumstantial evidence. *See, e.g., Island Car Wash, Inc. V. Norris*, 292 S.C. 595, 358 S.E.2d 150 (1987). Here, however, the conspiracy is apparent from the Defendant's own statement. Aside from the testimony at trial which was mentioned in the earlier order, several exhibits submitted by the Defendants in briefs to the court plainly show there intent to injure the Plaintiff. Exhibit 4 to the June 6, 1996 affidavit of Richard Cash is a letter dated May 24, 1993 from Michael Cloer to Pastors for Life, Inc. which is particularly telling:

> It would be difficult to overstate the importance of locating a CPC [presumably a "crisis pregnancy center"] next door to the abortion mill. Not only will the CPC provide a much needed service to mothers and babies in the inner city,, but in so doing it will undercut the "business" of the abortion mill, and thereby play a key role in closing it down.

Another equally probative exhibit is a videotape dated September 3, 1994 which shows Richard Cash, an employee of Pastors for Life, Inc., standing at the end of the clinic driveway with a sign which reads "Don't turn in, Keep Going."

These two pieces of evidence clearly bespeak an intention shared by Michael Cloer individually and Pastors for Life, Inc. collectively to injure the business of the Plaintiff. I would note for the sake of clarity, especially in light of Defendants' seventh and ninth defenses, that their speech is not directed toward the goal of ending abortion *generally*, but rather toward the specific purpose of decreasing the business at *this* clinic. As such, it is not protected under a First Amendment rationale. *See Madsen, supra; Schenck, supra.*

Under my reading of the case law, Pastor Cloer and Pastors for Life, Inc. could be found liable even if there were no evidence that they acted illegally to carry out their intention. The action would lie only upon the showing of some overt act in furtherance of the conspiracy by either of these Defendants or other co-conspirators. In point of fact, others, including Ruth Trippi and Betty Walsh with whom these defendants acted in concert, repeatedly engaged in overt acts, many of which were illegal (ie. crowding and blocking the clinic driveway).

As the court stated in *Lee v. Chesterfield Hospital*, 289 S.C. 6, 344 S.E. 2d 379 (Ct. App. 1986), the focus of the inquiry is on the damages incurred by the Plaintiff. In addition to the evidence of damages mentioned in the earlier order, there is also evidence in the form of a letter from Michael Cloer dated March 3, 1993 [Exhibit 2 to the affidavit to Richard Cash dated June 6, 1996] wherein figures from 1988 to 1992 show a decreasing number of abortions at Palmetto State. Although I have no reason to believe that these figures are accurate, it can hardly be said that the issue of damages is contested by the defendants. Moreover, there is evidence of overt acts on the part of Pastor Cloer and Pastors for Life, Inc. to sustain the claim for civil conspiracy over and above the acts of their co-conspirators. As stated at trail and in his affidavit, Pastor Cloer

admits to using a bullhorn to coordinate the activities of the sidewalk counselors gathered in front of the clinic. I find this activity was also a means of disrupting the Plaintiffs' business by disturbing the clinic's patients, and that it had the desired effect, as recounted by Ricki Riddle at the September 7, 1994 hearing. Richard Cash was likewise identified by Candy Kern and Elizabeth O'Connor at the same hearing as having crowed the clinic driveway and having blocked the view of Laurens Road. Because of these factual findings, I must conclude that Plaintiff has proved its entitlement to relief under its civil conspiracy cause of action against both Pastor Cloer and Pastors for Life, Inc.

Lastly, the Defendants maintain that my application of the rationale adopted by the United States Supreme Court in the *Madsen* and *Schenck* decisions is erroneous. It would seem from nature of the Defendants' argument that they would have the *Madsen* and *Schenck* cases limited to their respective factual scenarios-- and approach I feel is unwarranted and is against the clear intent of the Court. This case is factually similar in some respects to those which have preceded it, but is by no means a carbon copy of them. Neither is the relief granted here a mere duplication of what has been deemed constitutional in other contexts. Rather, the injunction speaks to the particular facts of this case-- the physical layout of the site, the intent and conduct of the Defendants, and the damages incurred by the Plaintiff. When viewed in the proper context, and from a neutral perspective, the prohibitions of the May 12, 1997 order follow *Madsen* and *Schenck* and achieve the narrowly-tailored relief envisioned by those decisions. The relief granted heretofore was most narrowly tailored so as not to impinge upon any constitutionally protected activity carried on by the Defendants.

Defendants' motion to alter or amend is therefore DENIED.

/s/
Costa M. Pleicones
Presiding Judge

July 15, 1997
Columbia, SC

[Clerk's Certification Stamp Omitted]

[Appendix F]

[The Supremacy Clause states:]

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Art. VI, cl. 2.

[The First Amendment states:]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[The Fourteenth Amendment, in pertinent part, states:]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[The South Carolina Religious Freedom Act, in pertinent part, states:]

Section 1-32-10. This chapter may be cited as the 'South Carolina Religious Freedom Act'.

Section 1-32-20. In this chapter:

(1) 'Demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(2) 'Exercise of religion' means the exercise of religion under the First Amendment to the United States Constitution or Article I, Section 2 of the State Constitution.

(3) 'Person' includes, but is not limited to, an individual, corporation, firm, partnership, association, or organization.

(4) 'State' means the State of South Carolina and any political subdivision of the State and includes a branch, department, agency, board, commission, instrumentality, entity, or officer, employee, official of the State or a political subdivision of the State, or any other person acting under color of law.

Section 1-32-30. The purposes of this chapter are to:

(1) restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened; and

(2) provide a claim or defense to persons whose exercise of religion is substantially burdened by the State.

Section 1-32-40. The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:

(1) in furtherance of a compelling state interest; and

(2) the least restrictive means of furthering that compelling state interest.

Section 1-32-45. This chapter does not affect the application of and must be applied in conjunction with Chapter 27 of Title 24, concerning inmate litigation.

Section 1-32-50. If a person's exercise of religion has been burdened in violation of this chapter, the person may assert the violation as a claim or defense in a judicial proceeding. If the person prevails in such a proceeding, the court shall award attorney's fees and costs.

Section 1-32-60. (A) This chapter applies to all state and local laws and ordinances and the implementation of those laws and ordinances, whether statutory or otherwise, and whether adopted before or after the effective date of this act.

(B) Nothing in this chapter may be construed to authorize the State to burden any religious belief.

(C) Nothing in this chapter may be construed to affect, interpret, or in any way address:

(1) that portion of the First Amendment of the United

States Constitution prohibiting laws respecting the establishment of religion;

(2) that portion of Article I, Section 2 of the State Constitution prohibiting laws respecting the establishment of religion.

(D) Granting state funding, benefits, or exemptions, to the extent permissible under the constitutional provisions enumerated in subsection (C)(1) and (2), does not constitute a violation of this chapter.

As used in this subsection, 'granting', with respect to state funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.